Petition

81-227

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No. _____

IN THE

Supreme Court of the United States

October Term, 1981

RUTH HALPRIN, THEA SPEYER, PATRICIA FOXX, SARAH LANIER BARBER and GLORIA DONADELLO, JED C. GOLDART, CAROL TARVIS, PHILLIP FOXX and VICKI FOXX, ANNE KARLAN, PATRICIA L. FRIEDLANDER, CHARLES S. RAMAT, LESLIE GORDON FAGAN, TYLER L. BISHOP and GERTRUDE LANDAU,

Petitioners,

v.

NEW YORK CITY CONCILIATION AND APPEALS BOARD, and 2 FIFTH AVENUE COMPANY (a partnership),

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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THE QUESTION PRESENTED

1. Can the doctrine of *res judicata* be applied to bar a Civil Rights Act action under 42 U.S.C. §1983 for relief for violations of petitioners' constitutional due process rights where the respondents brought an action on an Agreed Statement of Facts between themselves in the state appellate court without notice to the petitioners, in which respondents obtained a declaratory judgment which impaired petitioners' rights under a statute specifically enacted by the New York Legislature to protect petitioners?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

RUTH HALPRIN, THEA SPEYER, PATRICIA FOXX, SARAH LANIER BARBER and GLORIA DONADELLO, JED C. GOLDART, CAROL TAVRIS, PHILLIP FOXX and VICKI FOXX, ANNE KARLAN, PATRICIA L. FRIEDLANDER, CHARLES S. RAMAT, LESLIE GORDON FAGAN, TYLER L. BISHOP and GERTRUDE LANDAU,

Petitioners,

v.

NEW YORK CITY CONCILIATION AND APPEALS BOARD, and 2 FIFTH AVENUE COMPANY (a partnership),

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The thirteen individual petitioners pray that a writ of certiorari issue to review the judgment of the United

States Court of Appeals for the Second Circuit, entered June 4, 1981.

The issue is whether the federal courts can bar a Civil Rights Act litigant from seeking redress in the federal courts from deprivation of constitutional procedural due process and equal protection rights by invoking the doctrine of res judicata where the petitioners were deprived in the state courts from notice and the opportunity to defend those very issues in an action brought between the respondents without notice to the petitioners, which affected petitioners' statutory property rights.

THE PARTIES

The parties to this proceeding are the respondent New York City Conciliation and Appeals Board, a quasi-judicial

agency established to administer New York City's Rent Stabilization Law. The respondent 2 Fifth Avenue Company is landlord of an apartment building subject to New York's Rent Stabilization Law. The thirteen petitioners listed in the caption of the case are tenants thereof.

THE OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is set forth in Appendix at pp. 1a-4a. The opinion of the District Court is set forth in Appendix at pp. 4a-23a. Neither has been officially reported.

The opinion of the Appellate Division, First Department of the Supreme Court of the State of New York entitled 2 Fifth Avenue Company v. New York City Conciliation and Appeals Board is reported

at 57 A.D.2d 106, 393 N.Y.S.2d 409 (1977).

The opinion of the Appellate Division, First Department of the Supreme Court of the State of New York entitled Halprin v. New York City Conciliation and Appeals Board and 2 Fifth Avenue Company dated November 21, 1978 is set forth in Appendix at pp. 28a-30a. The opinion of the Court of Appeals of the State of New York entitled Halprin v. New York City Conciliation and Appeals Board and 2 Fifth Avenue Company dated January 10, 1979 is set forth in Appendix at pp. 26a-27a. Neither have been officially reported.

The opinion of the New York City Conciliation and Appeals Board dated December 15, 1977 is set forth in Appendix at pp. 31a-55a.

JURISDICTION

The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. §1257 and Rule 17 of the Supreme Court Rules where an important question of constitutional rights has been decided by a state court in conflict with applicable decisions of this court, and where a federal court of appeals has barred violations of federal constitutional rights from being litigated in the federal courts under the Civil Rights Act, 42 U.S.C. §1983 by the doctrine of res judicata based upon those state court determinations obtained in violation of constitutional procedural due process.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The due process and equal protec-

tion clause of the Fourteenth Amendment to the Constitution provides:

> "...nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

42 U.S.C. §1983 (1976) provides:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

New York's Chap. 392, Laws of 1975, set forth in full in Appendix at pp. 63a-67a, was enacted July 1, 1975. It repealed by amendment the prior law governing the processing of applications before the New York City Conciliation and Appeals Board, and specifically required at

§2 thereof that all pending applications before the Board be computed pursuant to the law as amended by said act.

STATEMENT OF THE CASE

In November 1974, the respondent 2 Fifth Avenue Company filed an application with the respondent New York City Conciliation and Appeals Board under New York's Rent Stabilization Law for an 18.38% comparative hardship increase in the rents paid by tenants in respondent's building which were regulated under said law. The tenants retained attorneys and opposed the proceedings before the Board.

During the pendency of the proceedings before the Board, the New York State Legislature on July 1, 1975 amended the hardship formula by enacting Chap. 392 of the Laws of 1975 (Appendix

pp. 63a-67a) which specifically required all pending applications before the Conciliation and Appeals Board to be computed pursuant to the new amended formula, which was more favorable to the tenants of apartment buildings.

About two years later, in November 1976, the respondents New York City Conciliation and Appeals Board and 2 Fifth Avenue Company brought an action on an Agreed Statement of Facts between themselves before the Appellate Division of New York's Supreme Court for a declaratory judgment to compel the Board to compute the 1974 application under the prior statutory formula that was repealed, in direct contravention of petitioners' rights under the statute Chap. 392, Laws of 1975 which required all pending applications to be computed under the new amended law. The respondents never noti-

fied the tenants or tenants' attorneys of this action being brought by the respondents on their own Agreed Statement of Facts, and petitioners had no notice and were prevented from defending their rights in that action which resulted in the judgment entitled 2 Fifth Avenue Company v. New York City Conciliation and Appeals Board, 57 A.D.2d 106, 393 N.Y.S. 2d 409 (1977) (Appendix pp. 56a-62a). The judgment directed the Board to compute the landlord's application under the old statutory formula in contravention of the statutory protection of Chap. 392, Laws of 1975, thereby impairing petitioners' equal protection under the law, without due process notice and the right to defend in said action.

The Conciliation and Appeals Board thereupon issued its order on December 15, 1977 (Appendix pp. 31a-55a)

which granted respondent 2 Fifth Avenue Company's application computed upon the old statutory formula that had been repealed and amended on July 1, 1975.

Petitioners retained counsel and commenced a proceeding under Article 78 of New York's Civil Practice Law and Rules to review and vacate the order of the Conciliation and Appeals Board claiming that their constitutional rights to due process notice and the right to defend their statutory rights in 2 Fifth Avenue v. New York City Conciliation and Appeals Board, supra, were violated and their equal protection rights under Chap. 392, Laws of 1975 were impaired in that declaratory judgment. Petitioners' application to vacate the Board order was heard by the same Appellate Division court that decided the 2 Fifth Avenue v. New York City Conciliation and Appeals

Board case, supra, and the court confirmed the Board's order without opinion in a summary order entitled Halprin v. New York City Conciliation and Appeals Board and 2 Fifth Avenue Company dated November 21, 1978 (Appendix pp. 28a-30a).

Petitioners filed a Notice of Appeal to the Court of Appeals of the State of New York.

On January 16, 1976 the New York Court of Appeals dismissed the appeal sua sponte on jurisdictional grounds that it did not involve a substantial constitutional question (Appendix pp. 26a-27a). Petitioners moved to vacate the New York Court of Appeals sua sponte dismissal, which was denied.

Petitioners then commenced this action in the United States District Court under the Civil Rights Act, 42 U.S.C. §1983, complaining that their con-

stitutional procedural due process rights were violated in 2 Fifth Avenue v. New York City Conciliations and Appeals Board, since the respondents failed to give them notice and the right to defend their statutory property rights in that judgment which violated their rights to the statutory protection of Chap. 392, Laws of 1975.

On February 27, 1981 the District Court granted summary judgment dismissing petitioners' complaint solely on the basis of res judicata under the holding of Winters v. Lavine, 574 F.2d 46 (2nd Cir. 1978) (Appendix pp. 24a-25a).

Petitioners urge that the underlying judgment in 2 Fifth Avenue Company v. Conciliation and Appeals Board, 57 A.D. 2d 106, was obtained in violation of petitioners' constitutional rights, since petitioners were prevented from contesting

the facts and defending their rights in that case in which their rights were impaired.

The doctrine of res judicata is misplaced because the record of the judgments in the state court show that petitioners did not have notice and the opportunity to contest the facts in the underlying judgment complained of in the District Court action.

The United States Court of Appeals affirmance on grounds that petitioners' constitutional rights were presented and litigated in a subsequent state Article 78 proceeding challenging the Board order, conflicts with the holdings of the Supreme Court of the United States in a number of cases culminating in Fuentes v. Shevin, 407 U.S. 67, 80, 92 S.Ct. 1893, rehearing denied 409 U.S. 902, 93 S.Ct. 177 (1972), that persons whose rights are

affected are entitled to due process notice and the opportunity to be heard at a meaningful time, before their rights are affected, and no subsequent hearing can undo violations of procedural due process deprivation which has already occurred.

Res judicata cannot apply when the parties have not had a full and fair opportunity to contest the facts and issues in the record of the judgments in the state courts.

The petitioners brought action in the District Court to contest the facts and issues which they were deprived of contesting in 2 Fifth Avenue Company v. New York City Conciliation and Appeals Board, and therefore the dismissal on res judicata grounds further deprived petitioners of the right to contest the issues and present witnesses on the

fundamental state court judgment obtained without due process.

POINT I

PETITIONERS' CONSTITUTIONAL DUE PROCESS PROCEDURAL RIGHTS WERE VIOLATED BY DEPRIVATION OF NOTICE AND THE RIGHT TO DEFEND.

Petitioners had a statutory entitlement to have their rents computed in accordance with Chap. 392, Laws of 1975 of New York's Rent Stabilization Law, which has been determined to be a property interest subject to procedural due process protection which cannot be impaired without prior notice and the opportunity to defend, and to do so constitutes a deprivation of their property rights in violation of the due process clause of the Fourteenth Amendment. Gramercy Spire Tenants Association v. Harris, etc., and New York City Concilia-

tion and Appeals Board, 466 F.Supp. 814, 826 (S.D.N.Y. 1977); Argo v. Hills, etc., and New York City Conciliation and Appeals Board, 425 F.Supp. 151 (E.D.N.Y. 1977, aff'd. 578 F.2d 1366 (2nd Cir. 1978).

Procedural due process protection requires timely notice and the right to defend.

As the Supreme Court stated in Fuentes v. Shevin, supra:

> "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' ...(cases cited)... It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner. Armstrong v. Manzo, 380 U.S. 545, 14 L.Ed.2d 52, 66..."
>
> * * * *
>
> "If the right to notice and a hearing is to serve its full purpose, then it is clear that it must be granted at a time when

> the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. 'This Court has not ...embraced the general proposition that a wrong way be done if it can be undone.' Stanley v. Illinois, 405 U.S. 645, 647, 31 L.Ed.2d 551, 556, 92 S.Ct. 1208." (emphasis supplied)

The judgment obtained by the respondents in 2 Fifth Avenue Company v. New York City Conciliation and Appeals Board 57 A.D.2d 106 (Appendix pp. 24a-25a) violated petitioners' constitutional due process rights since they were deprived of notice and the right to defend their rights under Chap. 392, Laws of 1975 in that action, and was a void judgment.

The subsequent order of the New York City Conciliation and Appeals Board

based upon that judgment was void.

Petitioners' Article 78 proceeding in the state court to vacate the Board order cannot constitute the basis for res judicata, since petitioners did not have the full and fair opportunity in the earlier litigation to address the issue now claimed to be decisive in the federal civil rights action, the constitutional rights to notice and the right to defend in the earlier action which decided the petitioners' fundamental rights under the Rent Stabilization Law.

Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950).

POINT II

THERE WAS NO BASIS FOR RES JUDICATA. RES JUDICATA REQUIRES A FULL AND FAIR HEARING IN STATE COURT AND PETITIONERS WERE DEPRIVED OF NOTICE AND THE RIGHT TO DEFEND THE UNDERLYING STATE JUDGMENT.

Title 42 U.S.C. §1983 was enacted by Congress to make the Federal Courts accessible to Civil Rights litigants for the vindication of federal civil rights independently of state court action. Monroe v. Pape, 365 U.S. 167, 180 (1961).

The Monroe decision generated an increased work load, leading federal courts to restrict the availability of a federal forum when a 1983 action was prosecuted subsequent to a similar state action. This restriction has been accomplished primarily through the expanded use of procedural doctrines as res judicata and federal abstention, but the use of res judicata has always been limited and never absolute. See Preclusive Effect of State Adjudications in Section 1983 Actions, The Second Circuit Review, Brooklyn Law Review, Summer 1979, Vol. XLV, p. 1169.

The result of Winters v. Lavine, 574 F.2d 46 (2d Cir. 1978) upon which the Second Circuit based its dismissal on res judicata grounds of petitioners' 1983 action has been criticized as imperiling basic constitutional rights by depriving civil rights litigants of an opportunity to receive meaningful determinations of their constitutional claims. See, Preclusive Effect of State Adjudications in Section 1983 Actions, The Second Circuit Review, supra, Vol. XLV, p. 1169, at 1208.

In Winters v. Lavine, 574 F.2d 46, at p. 56, the court referred to the New York concept of res judicata:

> "In New York...the rule of res judicata bars the relitigation of any issue which would be decisive in the later action and which was litigated and decided against the litigant in the earlier action, provided that the resolution of the issue in the earlier case must have been necessary to the judgment there and that the plaintiff

> must have had a 'full and fair' opportunity in the earlier litigation to address the issue now claimed to be decisive in the later action. E.g. Schwartz v. Public Administrator, 24 N.Y.2d 65, 71, 298 N.Y.S.2d 955, 960, 246 N.E.2d 725, 729 (1969)."
> (emphasis supplied)

It is thus manifest that if plaintiffs did not have a full and fair opportunity in the earlier litigation to present witnesses, cross-examine, submit evidence, and raise issues in 2 Fifth Avenue Company v. Conciliation and Appeals Board (which was decisive of their rights under the Rent Stabilization Law), they should have been afforded that opportunity in their 1983 action in the District Court.

It is no answer to tenants' complaint of due process deprivation to contend that their rights were adjudicated in the state courts. In the case of Thompson v. Whitman, 85 U.S. 457, it was held that the record of a judgment ren-

dered in another court may be contradicted as to the facts necessary to give the court jurisdiction; if such facts did not exist, the judgment was a nullity. The jurisdiction of a court to render a judgment affecting individual rights is always open to inquiry, when the judgment is relied upon in any other proceeding. Kilbourne v. Thompson, 103 U.S. 168, 197-8.

The holding of the Court of Appeals below, that petitioners' constitutional rights were presented and litigated in Halprin v. New York City Conciliation and Appeals Board and 2 Fifth Avenue Company (Appendix pp. 28a-30a) is erroneous, since petitioners' due process constitutional rights were violated in 2 Fifth Avenue Company v. New York City Conciliation and Appeals Board, 57 A.D.2d 106, and the void judgment in that case

constitutes the basis upon which petitioners seek a trial of the issues in their 1983 action. Res judicata does not apply.

CONCLUSION

The constitutional issues concerning the deprivation of petitioners' rights to notice and the right to defend against the judgment obtained by the respondents in 2 Fifth Avenue Company v. New York City Conciliation and Appeals Board, 57 A.D.2d 106, were not determined in accordance with constitutional due process requirements so as to constitute res judicata, and petitioners are entitled to a determination of those issues in this 1983 action. Petitioners request review of the constitutional issues by this Court.

Respectfully submitted,

LIONEL ALAN MARKS
Attorney for Petitioners

APPENDIX

UNITED STATES COURT OF APPEALS
for the
Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourth day of June one thousand nine hundred and eighty-one.

Present:

HONORABLE IRVING R. KAUFMAN,

HONORABLE JON O. NEWMAN,

Circuit Judges,

HONORABLE LEE P. GAGLIARDI,

District Judge
sitting by designation.

RUTH HALPRIN, THEA SPEYER, PATRICIA FOXX, SARAH LANIER BARBER and GLORIA DONADELLO, JED C. GOLDART, CAROL TAVRIS, PHILLIP FOXX and VICKI FOXX, ANNE KARLAN, PATRICIA L. FRIEDLANDER, CHARLES S. RAMAT, LESLIE GORDON FAGAN, TYLER L. BISHOP and GERTRUDE LANDAU,

Plaintiffs-Appellants,

v.

NEW YORK CITY CONCILIATION AND APPEALS BOARD, and 2 FIFTH AVENUE COMPANY (a partnership),

Defendants-Appellees.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

The petition, briefs, and memoranda submitted by appellants to the state

court in appellants' Article 78 proceeding, see Halprin v. New York City Conciliation and Appeals Board and 2 Fifth Avenue Co., disclose that appellants' federal constitutional claims were fully presented and litigated in that proceeding. Thus, those claims are barred by the doctrine of res judicata. See Powell v. Ward, No. 80-2141, slip op. at 1707 (2d Cir. Mar. 4, 1981); Winters v. Lavine, 574 F. 2d 46 (2d Cir. 1978). Accordingly, no genuine issue of material fact was presented in the district court, see Rule 56(a), Fed. R. Civ. P., and summary judgment to defendants was properly granted. See Donnelly v. Guion, 467 F. 2d 290 (2d Cir. 1972).

/s/ Irving R. Kaufman
IRVING R. KAUFMAN,

/s/ Jon O. Newman
JON O. NEWMAN, Circuit Judges.

/s/ Lee P. Gagliardi
LEE P. GAGLIARDI, District Judge.

UNITED STATES COURT OF APPEALS
FILED
JUN 04, 1981

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RUTH HALPRIN, THEA SPEYER, PATRICIA FOXX, SARAH LANIER BARBER and GLORIA DONADELLO, JED C. GOLDART, CAROL TAVRIS, PHILIP FOXX and VICKI FOXX, ANNE KARLAN, PATRICIA L. FRIEDLANDER, CHARLES S. RAMAT, LESLIE GORDON FAGAN, TYLER L. BISHOP and GERTRUDE LANDAU,

Plaintiffs,

-against-

NEW YORK CITY CONCILIATION AND APPEALS BOARD, and 2 FIFTH AVENUE COMPANY (a partnership),

Defendants.

This is an action brought pursuant to 42 U.S.C. §§ 1983 & 1985. Plaintiffs allege that defendants violated, and conspired to violate, plaintiffs' civil rights by denying them due process in connection with certain state administrative and judicial proceedings concerning the regulation of residential rents in plaintiffs' apartment building. Plain-

tiffs move for summary judgment pursuant to Rule 56, Fed. R. Civ. P. Defendants crossmove for the same relief. For the reasons that follow, defendants' motions for summary judgment are granted, and plaintiffs' motion is denied.

The fifteen plaintiffs are tenants in a 347-unit apartment building owned by defendant 2 Fifth Avenue Company ("the landlord"). The building, located at 2 Fifth Avenue, New York, New York, is subject to rent regulation under the New York City Rent Stabilization Law, N.Y. City Ad. Code §§ YY51-1.0 to YY51-8.0, N.Y. Unconsol. Laws following § 8610 (McKinney).

In November 1974, the landlord filed an application with defendant New York City Conciliation and Appeals Board ("the CAB") for a hardship rent increase under the Rent Stabilization Law. The CAB

notified the landlord in mid-December 1974 that the application had been docketed and subsequently served notice on the tenants that a hardship application for their building had been filed. Intending to oppose the landlord's application, the tenants retained counsel, who then entered an appearance before the CAB on the tenants' behalf. In early April 1975, after a series of extensions of time, the tenants submitted an answer in opposition to the application and requested a hearing at which they could produce opposing evidence.

Meanwhile, during the pendency of the landlord's application, the CAB was in the process of reconsidering its method of determining hardship rent-increase applications. On April 17, 1975, the CAB adopted by resolution a new interpretation - which substituted a

"dollar differntial" formula (based on the difference between gross rents and operating expenses) for the prior "ratio" formula (based on the ratio of gross rents to operating expenses) - was expected to result in lower rent increases for those landlords filing hardship applications. On May 20, 1975, the CAB notified all hardship applications. On May 20, 1975, the CAB notified all hardship applicants of this change and requested additional data.

The CAB's April 17 resolution also requested the New York Legislature to change the Stabilization Law to incorporate the new hardship formula. On July 1, 1975, the Legislature amended N.Y. City Ad. Code § YY51-6.0(c)(6) and adopted a revised formula similar to that proposed by the CAB. The new provision became effective on July 2, 1975.

Shortly after the effective date of the amended hardship provision, the owner of another large New York City apartment building brought an action in state court challenging the CAB's decision to apply the new formula to hardship applications filed before the July 2 effective date. On March 23, 1976, the Appellate Division of the New York Supreme Court held that the amended statute was to be applied to applications pending at the time of the amendment but ruled that "if ... the CAB deliberately or negligently delayed processing the application before it ..., then the [hardship applicant] is entitled to have its application processed under the previous law." Vanderbilt 77th Associates v. Conciliation and Appeals Board, 51 A.D.2d 946, 381 N.T.S.2d 234, 236 (1st Dep't 1976) (mem.).

At the landlord's request, the CAB had delayed acting on defendant 2 Fifth Avenue Company's application pending a decision in Vanderbilt. After Vanderbilt was decided, the CAB notified the landlord, by letter dated May 24, 1976, that "the new formula applies to cases which were pending in house when the law was changed absent negligent or deliberate delay by the [CAB] in the processing of the application." In the letter, the CAB requested that the landlord advise the Board within fifteen days whether the landlord would seek relief under the Vanderbilt exception. Marks aff., ex. C (July 25, 1980). The landlord determined to seek such relief and instituted a mandamus proceeding against the CAB pursuant to N.Y. CPLR art. 78. The 2 Fifth Avenue tenants were not made parties to this action and apparently did not receive notice of the pendency of

this proceeding.

The landlord and the CAB submitted their controversy to the state court on an agreed statement of facts, negotiated between them, pursuant to N.Y. CPLR 3222 (a). The tenants were not invited to participate in this negotiation. In a per curiam opinion issued April 14, 1977, the Appelate Division ruled that the CAB "deliberately delayed enforcement of a law not to its liking until it got one it did like" and, in a judgment filed June 6, 1977, directed the Board to determine the landlord's hardship application under the statutory provision in effect when the application was filed. 2 Fifth Avenue Co. v. New York City Conciliation and Appeals Board, 57 A.D.2d 106, 393 N.Y.S. 2d 409, 410 (1st Dep't 1977).

On June 8, 1977, the CAB notified the landlord and the 2 Fifth Avenue

tenants that a hearing had been scheduled for July 12 on the hardship application. Apparently, however, the July 12 hearing was not conducted as scheduled. Rather, by motions dated September 28, 1977, two tenants moved in the Appellate Division on behalf of themselves and all other tenants of 2 Fifth Avenue to intervene in the landlord's article 78 proceeding to vacate the decision of 2 Fifth Avenue Co. v. New York City Conciliation and Appeals Board, supra. In support of their motions, the tenants alleged:

a) That procedural due process under the Fifth and Fourteenth Amendments to the Constitution of theUnited States of America and Article 1, Section 6 of the Constitution of this State of New York was denied the tenants in the prior proceedings herein by failing to give tenants notice, hearing and the right to defend the proceedings heretofore taken in this Court which directly affects their property rights under their respective leases with the Petitioner.

b) That procedural due process under the Fifth and Fourteenth Amendments

of the Constitution of the United States and Article 1, Section 6, and Article 6 of the Constitution of the State of New York was denied the tenants, in failing to provide for a trial of the property rights of the tenants which are directly affected by the decision of this Court.

c) That the decision of this Court in the above entitled proceeding was not based upon due process of law but entered upon a prejudicial statement of facts of which the tenants were not parties, but the purpose of which directly affects the rents of tenants under their lease.

d) That the decision of this Court is incorrect, unjust and unreasonable in that it is based upon errors of law and fact and is an unjust determination affecting substantial property rights of each tenant who were [sic] not made parties to the proceedings and unable to defend their [sic] rights before the Court.

Marks motion, annexed as ex. 7 to Doskow aff. (June 20, 1980). The motions were denied without opinion on November 3, 1977.

The CAB then commenced a hearing on the landlord's hardship application on November 9, 1977. The tenants participated in that proceeding. On December 14, 1977, the landlord and a majority of the

tenants agreed to a settlement of their dispute, subject to CAB approval, pursuant to which rents would be raised 11 percent. Although this increase was nominally made effective January 1, 1975, the landlord waived collection of any retroactive increases. Thus, the increased rents were actually imposed effective January 1, 1978. The tenants of 196 of the 347 apartments in the building agreed to the terms of the settlement. The settlement expressly preserved the rights of all those tenants, including the plaintiffs in this action, who did not agree.

In a decision dated December 15, 1977, the CAB found that the landlord was entitled to a hardship increase of 14.01 percent, effective January 26, 1975. Approving the landlord-tenant settlement, however, the Board reduced the increase to

11 percent, effective January 25, 1975, but subject to the landlord's waiver of collectibility of increases prior to January 1, 1978. Thus, the CAB's order incorporated the parties' settlement.

In mid-April 1978 plaintiffs commenced a proceeding against defendants in state court pursuant to N.Y. CPLR art. 78. Plaintiffs' article 78 petition sought to overturn the CAB's decision approving the 11-percent settlement. In this petition plaintiffs made, inter alia, the same due process arguments they had raised in support of their motion to intervene in the landlord's earlier article 78 proceeding against the CAB. On November 21, 1978, the Appellate Division, First Department, entered a summary order unanimously confirming the CAB determination.

Plaintiffs appealed the Appellate

Division's decision to the New York Court of Appeals. On January 16, 1979, the Court of Appeals dismissed the appeal sua sponte after determining that the lower court's decision was not appealable as of right pursuant to N.Y. CPLR 5601(b)(1). Arguing that the appeal sought involved two substantial constitutional issues, and therefore that an appeal as of right was available, plaintiffs then moved to vacate the Court of Appeals sua sponte dismissal. The motion was denied on March 20, 1979. This action followed in January 1980.

In support of their motions for summary judgment defendants argue that plaintiffs' action is barred by the doctrine of res judicata. Defendants maintain that plaintiffs' constitutional claims were fully litigated, and passed upon, in the two state court article 78

proceedings described above. As the Court understands it, plaintiffs' argument is that res judicata cannot be a bar here because neither in the Appellate Division's order denying plaintiffs' motion to intervene in 2 Fifth Avenue Co. v. New York City Conciliation and Appeals Board nor in its or the Court of Appeals' order in plaintiffs' article 78 proceeding against the landlord was there any explanation given for the courts' action. Thus, although at oral argument plaintiffs were unable to articulate any alternative grounds on which the state courts could have ruled without reaching plaintiffs' constitutional claims, plaintiffs maintain that the state courts' determination not to issue a written decision precludes the operation of res judicata as a bar in their subsequent action here. In the

Court's view, defendants have the better of this argument.

The doctrine of res judicata, even as narrowly defined in the context of section 1983 civil rights actions, normally operates to preclude a federal court from adjudicating a claim that has been the subject of a prior adjudication in state court. Winters v. Lavine, 573 F.2d 46, 56 (2d Cir. 1978). The only limitation on the application of this rule is where the claim was not actually litigated and determined in the state court suit. See Graves v. Ogliati, 550 F.2d 1327, 1328029 (2d Cir. 1977). Plaintiffs' claims in this action are precisely the same as those claims raised in the state court article 78 proceedings. Accordingly, the Court is barred by the doctrine of res judicata from finding in plaintiffs' favor on the

merits of their claims unless these claims were not actually litigated and determined in the state actions.

The Court has reviewed the briefs and memoranda of law, affidavits, and exhibits filed in the two state court article 78 proceedings. In support of their motion to intervene in 2 Fifth Avenue Co. v. New York City Conciliation and Appeals Board, plaintiffs raised the due process claims made here. In opposition to the motion, defendants argued the merits of plaintiffs' constitutional claims. As far as the court can ascertain, defendants did not present an alternative ground on which the Appellate Division could rely in denying the motion and, as noted earlier, plaintiffs have not suggested to this Court that such a ground existed.

There is, of course, the possibility

that the Appellate Division determined to deny plaintiffs' motion to intervene purely for procedural reasons. The motion was filed after judgment, and the court could have found the motion untimely. Both the New York rule governing intervention as of right, N.Y. CPLR § 1012, and the rule providing for permissive intervention, N.Y. CPLR § 1013, require a "timely motion." It is, however, difficult for the Court to conceive that the Appellate Division denied the motion as untimely, inasmuch as (a) such an argument was not advanced by defendants and, more importantly, (b) it would have been untenable for the state court to deny the motion as untimely made when the essence of plaintiffs' case was that they were unaware of the initial article 78 proceeding because of the alleged due process violations.

In any event, the Court need not concern itself with this possibility. For in the second attempt plaintiffs made to stop a rent-increase decision under the old hardship formula - the article 78 proceeding plaintiffs initiated in April 1978 - it was necessary for the Appellate Division to pass on the merits of the constitutional claims raised here (unless, of course, it determined that its earlier ruling denying intervention was a decision on the merits). Accordingly, the Court finds that plaintiffs' claims in this action were "actually litigated and determined," Winters v. Lavine, supra, 574 F.2d at 57, in a prior state proceeding.

Plaintiffs' contention that neither of the state court determinations can be given preclusive effect here because the state court decisions were without opinion is without merit. The Second

Circuit in Winters v. Lavine, supra, id. at 60-61, explicitly dealt with such a contention. The Winters court held that omitting to mention a constitutional question in an opinion did not eliminate the question from the case or make the decision less an adjudication of it. Id. at 61 (quoting Grubb v. Public Utilities Commission, 281 U.S. 470, 477-78 (1930)).

Moreover, the court of appeals in Winters also ruled that a dismissal of an appeal by the New York Court of Appeals on the ground that no substantial constitutional question was involved (as occurred in plaintiffs' case) does not mean that the lower state court determination did not rest on constitutional grounds. Id. at 61. Although such a dismissal could be based on a determination by New York's highest court that an

alternative, nonconstitutional ground supported the lower court determination, it could also be that the court found the constitutional questions raised below were themselves insubstantial on the merits. See id. at 61-62 & n.15. In the Court's view, the only nonconstitutional ground on which the Appellate Division's determination could have rested is that plaintiffs had already received an adjudication on the merits when that same court denied their motion to intervene in the earlier article 78 proceeding. Nevertheless, all of the immediately foregoing notwithstanding,

> even if there were no opportunity whatsoever ... to appeal the Appellate Division's ruling, that decision would still retain its preclusive effect, for the extent of preclusion produced by a prior judicial determination of meterial and essential issues is not affected by the fact that the losing party could not appeal that determination to a higher court.

Id. at 62.

Plaintiffs have had a full and fair opportunity to present their claims in state court, and those claims were actually litigated and determined in previous state court proceedings. This action is therefore precluded by the doctrine of res judicata. Accordingly, plaintiffs' motion is denied, defendants' cross-motions are granted, and the complaint is dismissed.

It is so ordered.

Dated: New York, New York
February 26, 1981

/s/ Robert J. Ward
U.S.D.J.

JUDGMENT OF DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

RUTH HALPRIN, THEA SPEYER,
PATRICIA FOXX, SARAH LANIER BARBER,
and GLORIA DONADELLO, et al

Plaintiffs

-against-

NEW YORK CITY CONCILIATION AND
APPEALS BOARD, and 2 FIFTH AVENUE
COMPANY (a partnership)

Defendants

- x

Plaintiffs having moved for summary judgment and the defendants having cross-moved for the same relief and the said motions having come before the Honorable Robert J. Ward, United States District Judge, and the Court thereafter on February 26, 1981, having handed down its memorandum denying plaintiffs' motion and granting defendants' motion, it is,

ORDERED, ADJUDGED AND DECREED:

That the complaint be and it is hereby dismissed.

Dated: New York, N.Y.
February 27, 1981

/s/ Raymond F. Burghordt
Clerk

U.S. District Court
Filed
Feb 27, 1981

STATE OF NEW YORK

COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the sixteenth day of January A.D. 1979.

PRESENT, HON. LAWRENCE H. COOKE,
Chief Judge, presiding.

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1 Mo. No. 40 SSD 3
In the Matter of Ruth Halprin & ors., on behalf of themselves and other tenants of 2 Fifth Avenue,
Appellants,
vs.
New York City Conciliation and Appeals Board & ano.,
Respondents.

The appellants having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs,

by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

/s/ Joseph W. Bellacosa
Joseph W. Bellacosa
Clerk of the Court

APPELLATE DIVISION DATED NOVEMBER 21, 1978 CONFIRMING CAB DETERMINATION.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on November 21, 1978.

Present-Hon. Theodore R. Kupferman, Justice Presiding,

Samuel J. Silverman,
Arnold L. Fein,
Paul J. Yesawich, Jr.,
Leonard H. Sandler,
Justices.

In the Matter of the Application of Ruth Halprin, Thea C. Speyer, Patricia Foxx, Sarah Lanier Barber and Gloria Donadello, Jed C. Goldart, Carol Tavris, Philip H. Foxx and Vicki Foxx, Ann Karlan, Patricia L. Friedlander, Charles S. Ramat, Leslie Gordon Fagan, Tyler L. Bishop, and Gertrude Landau, on behalf of themselves and other tenants of 2 Fifth Avenue, Petitioners

-against-

New York City Conciliation and Appeals Board, and 2 Fifth Avenue Company, Respondents.

The above named petitioner having moved at Special Term of the Supreme Court, New York County, pursuant to Article 78 of the Civil Practice Law and Rules, for a review by the court of a determination of the respondent New York City Conciliation and Appeals Board, dated December 15, 1977, granting a hardship rent increase based upon an application filed by respondent 2 Fifth Avenue Company,

And this proceeding having been transferred by order of said court, entered on July 14, 1978, to this Court for review and determination,

And said proceeding having duly come on to be heard before this Court and having been argued by Mr. Lionel Alan Marks of counsel for the petitioners, and by Mr. William E. Rosen of counsel for respondent Conciliation and Appeals

Board, and by Mr. Ambrose Doskow of counsel for respondent 2 Fifth Avenue Company; and due deliberation having been had thereon,

It is unanimously ordered that the determination of the respondent Conciliation and Appeals Board be and the same hereby is confirmed, without costs and without disbursements. The Clerk is directed to enter judgment in favor or respondents confirming the determination.

ENTER:

/s/Joseph J. Lucchi
Clerk

CAB ORDER

OPINION NUMBER 7193

DOCKET NUMBER: OM-1154

OWNER: 2 Fifth Avenue Company
ADDRESS: 345 Park Ave., New York, N.Y. 10022

TENANTS: Various
ADDRESS: 2 Fifth Ave., New York, N.Y. 10011

FACTS:

The owner is a member of the Rent Stabilization Association and the dwelling units involved are subject to the Rent Stabilization Law.

The subject premises is a 20 story multiple dwelling consisting of 347 dwelling units, of which one unit is reserved for staff employee use. All of the dwelling units are subject to this order.

This case involved an application by the owner for a comparative hardship increase under the providions of the Rent

Stabilization Law prior to its amendment by Chapter 549 of the Laws of 1975. The Owner completed its filing of a comparative hardship application on December 27, 1974 by filing a certification of service of the application upon the tenants as required by the Board. The owner's application sought a building-wide rent increase of 18.38% under the "ratio" comparative hardship formula then in the law.

The owner's application claimed that pursuant to the "Ratio" Formula the level of fair rent increases was insufficient to enable the property to maintain approximately the same ratio between operating expenses and gross rents which prevailed on the average over the immediately preceding five year comparative period and that an additional increase in

rent in the amount of 18.38 per cent was therefore warranted under the comparative hardship provisions of the Law and Code.

The owner used 1973, the last complete calendar year prior to the application for the application's current test period; and the immediately preceding calendar years 1972, 1971, 1970, 1969 and 1968 were used as the comparative period.

The owner listed its gross rental income for 1973 at $2,058.499. which represented an annualization of the rent income of the dwelling units for November 1974 plus commercial income of $146,003. Operating expense for 1973 were listed at $1,381,455. Based on these figures, the owner calculated its ration of operating expenses to gross rental income in 1973 at 67.11 per cent.

For the preceding five year comparative period, the owner listed its gross rental income and total operating expenses as follows:

YEAR ENDED	GROSS RENTAL INCOME	GROSS OPERATING EXPENSES
December 31, 1972	$1,840,304.	$1,090,388.
December 31, 1971	1,736,963.	1,017,446.
December 31, 1970	1,674,777.	927,771.
December 31, 1969	1,588,761.	909,306.
December 31, 1968	1,504,311.	838,698.
Total	$8,345,116.	$4,783,559.

The owner stated that the ratio between the operating expenses and gross rental income for the preceding five year comparative period averaged 57.32 per cent.

Based on its figures, the owner concluded that the 18.38 per cent rent increase was warranted to restore the owner to the

57.32 per cent ration which prevailed over the preceding five year comparative period.

Pursuant to Board requirements then applicable, the owner submitted supporting documentation including copies of financial statements and Federal Income Tax Returns for all years in the base and current periods.

The owner also completed the forms as required on the limitation formula contained in Section 43 of the Code. Answers were received from various tenants objecting to the rent increase on grounds that the standards and building-wide guideline increases upon lease renewal should be ample to absorb higher costs. They urged that before any hardship increase was granted, the Conciliation and Appeals Board schedule

hearings on the issue. In addition, nine of the answers asserted diminution of services including charges that there is inadequate security; that building maintenance services have deteriorated and that the public areas are dirty.

An answer was also received from an attorney representing the tenant's association objecting to various aspects of the owner's application. He urged that the tenants should be afforded the right to inspect the owner's books and records and requested a hearing.

In reply, the owner reiterated that it had complied with all of the Board's requirements.

In accordance with standard procedures, a check was made of the Office of Code Enforcement records to determine the

violation picture on the premises as of the date the application was filed. Their records showed a violation picture as listed in Addendum #2.

In the weeks immediately following the filing of this and many other similar applications, affecting thousands of tenants, the Board undertook a review of the entire ratio formula and the impact, if any, of the limitation formula. Because the ratio comparative hardship formula was inconsistent both in its terms and effect with other provisions of the Rent Stabilization Law and because the limitation formula adopted in 1971 to curb the inconsistencies did not seem to be having the intended effect, the Board considered the adoption of a reinterpretation of the existing formula to correct the problem adminstratively. To

this end it instructed staff to obtain additional data for study in the effort to adopt a feasible reinterpretation of the hardship law then on the books. On April 17, 1975, the Board did adopt a reinterpretation of that hardship law which would have tested the owner's hardship based on a dollar for dollar cash flow as opposed to the ratio system. The Board's reinterpretation would have continued to compare the current one year test period to the immediately preceding five years as then set forth in the Law.

On May 20, 1975, the Board informed this and all other applicants by letter that (a) the application would be re-evaluated pursuant to such reinterpretation and relief would be available only if the level of fair rent increases resulting from the stabilization rents proved

insufficient to enable the property to maintain approximately the same differential between the operating expenses and gross rents which had prevailed over the immediately preceding five (5) year period.

Each of the applicants was formally asked to submit additional data which would permit the Board to calculate the actual dollar differential between gross rents and operating expenses prevailing for the test period. The owner was also directed to serve the tenants with all additional data in accordance with instructions detailed in the letter.

On July 2, 1975, and before the owner had responded to this notice, the State Statutorily amended the comparative hardship provisions of the Rent Stabilization Law by Chapters 392 and 549, Laws of 1975,

to eliminate the ratio formula and to substitute a dollar differential formula. While this part of the statutory clause was similar to the test adopted by the Board, the state altered the Board's approach by substituting new base and current test periods (the base test years generally from 1968 to 1970 and the current test period three years ending no earlier than 6 months before filing). The new law provided that its modified provisions would apply to pending as well as future applications but reserved the owner's right to retroactivity by providing that any increase due under the revised formula would take effect one month after the date on which the owner had completed his original filing (January 26, 1975, in this case).

Another applicant challenged the

applicability of the new law to his pending application [Matter of Vanderbilt 77th Associates v. Conciliation and Appeals Board, infra.]

The lower court agreed with the owner but on appeal the Appellate Division, First Department, ruled that the new law did by its very terms apply to pending cases except nevertheless where there had been negligent or willful delay by the Conciliation and Appeals Board in processing said pending application reversing impart the lower Court rulings, Matter of Vanderbilt 77th Associates v. Conciliation and Appeals Board, N.Y.L.J., March 25, 1976, p. 6, col. 2, App. Div. 1st Dept., the appellate division remanded the case to the lower court for a trial on the issue of delay.

On June 1, 1976, this owner was requested to advise the Board as to whether it intended to assert the Vanderbilt exception or whether it would agree to have its application processed under the change in the hardship law.

In response, the owner commenced a Mandamus proceeding on June 16, 1976 to compel the Conciliation and Appeals Board to process his application in accordance with law at the time of the owner's initial filing on the grounds that its application had been deliberately delayed while the Board was reviewing the hardship formula.

Since there was no dispute over the Board's actions during the period in question, but merely whether those actions constituted delay within the meaning of the Appellate Court's decision

in the Vanderbilt ruling and since in this case, unlike the Vanderbilt case, there was no issue as to whether the owner's initial application was fully complete in accordance with the law then in effect the action was submitted to the Appellate Division, First Department based on an agreed statement of facts. The Appellate Court ruled on April 1, 1977 that the actions of the Conciliation and Appeals Board is seeking to reiterate the law administratively had deliberately delayed the processing of this owner's application and that the owner was entitled to have his application processed in accordance with the law in existance at the time of the owner's filing and prior to the statutory changes (Matter of 2 Fifth Avenue v. Conciliation and Appeals Board, N.Y.L.J., April 18, 1977 App. Div. (1st Dept.))

The tenants in this case thereafter moved to have the case reopened and to intervene. This motion was denied by the Appellate Division on November 7, 1977. (Matter of 2 Fifth Avenue v. Conciliation and Appeals Board, N.Y.L.J., November 7, 1977 p.7, Col. 1, App. Div. First Dept.)

During the period between the initial 2 Fifth Avenue ruling hereinabove described by the Appellate Division granting this owner's petition, and the second ruling by that court, denying the tenants' motion, the owner offered the tenants an opportunity to review its books and records and various conferences and/or hearings were held at the Conciliation and Appeals Board. At this point, Conciliation and Appeals Board staff review of the owner's application had resulted in a preliminary finding that the owner's entitlement

should be reduced from 18.38% to 14.01%. The hearings were adjourned to December 14, 1977. On that date, the attorney for the Tenants Association, another attorney who resides in the building and represents himself as well as several other tenants and the owner's attorney entered into a stipulated settlement of this case subject to the Board's approval. It provides as follows:

"IT IS HEREBY STIPULATED AND AGREED by and between GOLDFARB & FLEECE, attorneys for 2 Fifth Avenue Company ("Owner") and FREEDMAN, OZIEL & BRETT, attorneys for 2 Fifth Avenue Tenants Organization and LIONEL ALAN MARKS, pro se and attorney for various tenants that the application for a comparative hardship rent increase filed with the New York City Conciliation and Appeals Board on or about December 27, 1974 be settled on the following terms and conditions:

1. Messrs. Brett and Marks represent that those tenants set forth on Exhibit A hereof, namely 196 of 347 apartments in the premises have agreed to the terms of this settlement.

2. The Owner will be entitled to an

increase in the stabilization rent for each apartment equal to 11% of the stabilized rent lawfully charged to each apartment on the November 6, 1974 rent roll, a copy of which was submitted to the Conciliation and Appeals Board with the Owner's application. The resulting amount should be added to the monthly rent in effect on January 1, 1978.

3. Such rent increase shall be effective January 1, 1975. The owner waives collectibility of any portion accruing on or before December 31, 1977. The increase will be payable by the tenants with their January 1978 rent.

4. Absent a Board Order to the contrary, the owner shall maintain all required services which were furnished or were required to be furnished for the dwelling unit on May 31, 1968 and all additional services provided or required to be provided thereafter; except to the extent that any such service now, or at any time hereafter, is not required to be furnished under said Law and Code.

5. The parties agree to withdraw with prejudice any and all litigation which may be pending in connection with this rent hardship application.

6. It is the intent hereof that this Stipulation of Settlement will be submitted to the Board for approval and in the event of such approval will

be embodied in the Board's final order and opinion. Such order shall apply to all apartments in the building whether or not the tenant thereof has agreed to the terms of this settlement. The order shall also provide that tenants whose leases do not contain a clause pursuant to Section 42B of the Rent Stabilization Code shall not be obligated to pay the increase except as provided by Section 42B of the Code. If the tenants' present lease does not contain a 42B clause, the rent increase shall not take effect until termination of such lease. Those tenants who have not agreed to the terms of this settlement shall be entitled to terminate their tenancies pursuant to Section 40 of the Rent Stabilization Code, or assert any rights they may have."

APPLICABLE LAW AND REGULATIONS:

Section YY51-5.0, YY51-6.0(b) and (c), (6) and (7) of the Law. Sections 2(m), 34(d) and (e), 43(a) and 62 of the Code. Rules 4, 5, 7 and 10 of the Conciliation and Appeals Board.

DETERMINATION:

In view of the decision by the Appellate Division in the Matter of 2 Fifth Avenue

case, supra, this Board must apply the ratio formula in effect prior to the law's amendment. That ratio formula entitled the owner to comparative hardship relief where the gross rents resulting from the stabilization rents are insufficient to enable the property to maintain approximately the same ratio between operating expenses and gross rents in the current year used in the application as compared to the ratio between Operating Expenses and Gross Rents which prevailed over the five immediately preceding years.

Based on the preliminary results of staff's accounting review, the Owner's hardship is reduced from 18.38% to 14.01%. This increase specifically provided in the relevant statutory provision, takes effect as of January 26,

1975, 30 days after the owner completed the filing of his initial application. The reduction to 14.01% is warranted because of the following accounting conclusions shown on the attached Accounting Review:

(1) Staff's accounting review establishes that the current year's ratio formula between expenses and income must be reduced from 67.11% to 65.10% based on adjustments of income and expenses;

(2) Staff's accounting review establishes that the ratio formula between expenses and income for the preceding five year comparative period must be increased from 57.32 per cent to 57.60 per cent based on adjustments of income and expenses;

(3) The importance of these adjustments in income and expenses during the current

test period and preceding 5 year comparative period (as set forth under item (1) and (2) above) is to reduce the hardship percentage under the ratio formula from 18.38 per cent to 14.01 per cent building-wide calculated on the November 1974 rent roll results in an annual warranted dollar increase in rent building-wide calculated on the November 1974 rent roll results in an annual warranted dollar increase in rent building-wide of $267,933.

(4) The limitation formula has no impact on the increase in this case because the amount of increase as calculated under the limitation formula (as shown on the attached Accounting Review) exceeds the hardship increase resulting from the ratio formula.

The Board notes that a majority of the tenants in this case, through their respective attorneys and the owner have entered into a settlement whereby the 14.01% increase in this case would be reduced to 11% collectible January 1, 1978 with the owner waiving collectibility of the increase due prior to that date under the terms of this order. Based thereon, the Board approves the terms of this settlement and grants the owner's application to the extent of approving a building-wide increase of 11% effective January 25, 1975, subject to the owner's waiver of the collectibility of any portion of said increase accruing prior to January 1, 1978.

The owner and tenants may determine the dollar amount of each tenant's increase collectible January 1, 1978 by multiplying

the stabilized rent charged for the dwelling unit on November 6, 1974 by 11%. The resulting dollar amount will then be added to the January 1, 1978 rent as shown in the example below.

Example: Facts:

1. The tenant was paying $400. per month according to the November 4, 1974 rent roll submitted by the owner with its application.
2. The tenant was then under a lease expiring February 28, 1975.
3. The tenant entered into a three year renewal lease which commenced March 1, 1975 at the appropriate guidelines lease increase bringing the tenant's rent to $444. on March 1, 1975.
4. Since that $444. lease has not yet expired, the tenant's rent on December 31, 1977 is $444.

The January 1, rent with the 11% hardship

increase is calculated as follows:

$400.00....November 6, 1974 rent in example

x.11%...The dollar amount of the hardship increase

=$44.00....The dollar amount of the hardship increase.

To add the $44.00 increase into the rent, you start with the December 31, 1977 rent:

$444.00....December 31, 1977 rent

+44.00....The dollar amount of the hardship increase

=$488.00...The January 1, 1978 lawful stabilized rent pursuant to this order.

Those tenants who are currently in occupancy under a lease which does not make any provision for a rent increase in accordance with Sections 20B and 42(b) of the Code, the 11% hardship increase authorized herein shall be collectible

prospectively from the expiration of such lease.

Section 40 authorizes any tenant affected by this order to cancel his lease upon sixty (60) days written notice to the owner, provided that such notice is served on the owner within thirty (30) days after receipt of a copy of this order. Upon exercising this option, the tenant may remain in occupancy at no increase in rent until he vacates the premises.

Section 36 of the Code provides that no more than one order adjusting any stabilization rent for any dwelling unit under this Code for hardship may be issued in any 36 month period. For purposes of this application the 36 month period commences running on January 1, 1978.

Section 62A of the Code requires that an owner maintain all required services as defined in Section 2(m) of the Code, to include all services which were furnished or required to be furnished on May 31, 1968 including repairs and maintenance.

The owner is directed to restore services to the required level by correcting those conditions which gave rise to the City Office of Code Enforcement violations.

The application is granted to the extent herein provided.

CONCILIATION AND APPEALS BOARD

Participating: December 15, 1977

Dean Jerome Prince, Chairman
Frank A. Barrera
Marc A. Goodman
Marty Markowitz
Allan Stillman
Irving H. Stolz
Paul A. Victor
Jacob B. Ward
Robert C. Weaver

Application of 2 FIFTH AVENUE COMPANY,

Petitioner,

v.

NEW YORK CITY CONCILIATION AND APPEALS BOARD,

Respondent.

Supreme Court, Appellate Division,
First Department.

April 14, 1977.

Before KUPFERMAN, J.P., and BIRNS, LANE and MARKEWICH, JJ.

PER CURIAM:

In this proceeding under Article 78 CPLR petitioner landlord seeks mandamus to compel respondent Conciliation and Appeals Board to decide its application for a hardship rent increase in accordance with the statute in force when the application was filed in November 1974 instead of the less favorable superceding statute enacted effective the following July. Petitioner asserts that respondent's

unwarranted delay in processing the application was deliberate and wilful, its inaction having been due to its dissatisfaction with the earlier "ratio formula" which, by a "reinterpretation" of the statute, it replaced with a more onerous "dollar to dollar cash flow" formula and brought about enactment of a new statute (Administrative Code of City of New York, section YY51-6.0, NYC Rent Stabilization Law, 1969). We are not here concerned with the merits of either formula but only with whether the delay which took place to petitioner's detriment was the result of respondent's deliberate inaction designed to bring about that very result.

There is no factual dispute, the parties having submitted an agreed statement. It is for us to fix blame, if any there be, for the delay, and to do this

by distillation from the agreed facts.

When filed November 25, 1974, petitioner's application was eighteenth on respondent's calendar and, within half a month, December 11, had been reviewed and found fully in compliance with the then requirements. Due notice was served on the tenants, completed a day or two more than a month after filing, December 27. The tenants had ten days to answer and, by letters dated January 3 and 28, 1975, they requested of respondent, through counsel, a thirty day extension of time so to do. A copy of the first letter was forwarded to petitioner in a week, but notification of the other letter was not sent until February 20, after petitioner had requested determination. At a meeting held a week later, respondent requested additional information. A new letter seeking

action was sent on March 11, responded to by telephone notice that time to answer had been further extended to April 10, because of exploration of possible "reinterpretation" of the hardship formula set out in the statute. On April 17, the reinterpretation was adopted, though not promulgated formally until May 20, when more information was requested of petitioner, and which required renewal of the process of service and answer.

That reinterpretation had been under consideration and in work since the preceding mid-September, initiated after expressions of dissatisfaction with the applicable statute as to the ratio it provided between gross rents and operating expenses. By November, respondent was working on the possibility of "a formal ruling which would 'freeze' application

of the rpesent formula until a more workable and equitable one can be devised." In February, respondent was considering the possibility of a new statute to replace that which then existed, or else its reinterpretation so that "statutory language which says one thing can be interpreted to mean something else when . . . [its] . . . seemingly clear meaning would completely undermine the administrative system." Shades of Lewis Carroll: "When I use a word, it means just what I choose it to mean-neither more nor less."! On April 17, the reinterpretation was adopted, with a resolution to request the Legislature to change the statute accordingly. Meanwhile, petitioner marked time, and the new statute became effective July 2.

Quite obviously, these pertinent facts cannot be read in any way except that

respondent deliberately delayed enforcement of a law not to its liking until it got one it did like, and it is so found. It is therfore concluded that petitioner is entitled to the relief it seeks. See Matter of Vanderbilt 77th Associates, 51 A.D.2d 946, 381 N.Y.S.2d 234; Our Lady RC Church v. Ball, 45 A.D. 2d 66, 356 N.Y.S.2d 641, aff. on opn. 38 N.Y.2d 780, 381 N.Y.S.2d 866, 345 N.E.3d 338. There will be judgment for petitioner accordingly, without costs and without disbursements.

Settle declaratory judgment of mandamus on notice.

Submission of controversy upon an agreed statement of facts pursuant to CPLR 3222. Judgment unanimously found for petitioner, without costs and without disbursements.

Settle declaratory judgment of

mandamus on notice.

All concur.

New York City - Administrative Code -
Rent Rates Chapter 392

An Act to amend the administrative code of the city of New Y ork, in relation to the criteria for the code of stabilization of rents.

Approved July 1, 1975, effective as provided in section 2.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph six of subdivision c of section YY51-6.0 of the administrative code of the city of New York, as added by local law sixteen of the laws of nineteen hundred sixty-nine, is hereby amended to read as follows:

(6) provides criteria whereby the conciliation and appeals board may act upon applications by owners for increases

in excess of the level of fair rent increase established under this law provided, however, that such criteria shall provide (a) as to hardship applications, for a finding that the level of fair rent increase is not sufficient to enable the owner to maintain approximately the same average annual net income (which shall be computed without regard to debt service, financing costs or management fees) for the three year period ending on or within six months of the date of an application pursuant to such criteria as compared with annual net income, which prevailed on the average over the period nineteen hundred sixty-eight through nineteen hundred seventy, or for the first three years of operation if the building was completed since nineteen hundred sixty-eight; and (b) as to completed building-

wide major capital improvements, for a finding that such improvements are deemed depreciable under the Internal Revenue Code and that the cost is to be amortized over a five-year period, based upon cash purchase price exclusive of interest or service charges. Notwithstanding anything to the contrary contained herein, no increase granted pursuant to this paragraph shall, when added to the annual gross rents, as determined by the conciliation and appeals board, exceed the sum of, (i) the annual operating expenses, (ii) an allowance for management services as determined by the conciliation and appeals board, (iii) actual annual mortgage debt service (interest and amortization) on its indebtedness to a lending institution, an insurance company, a retirement fund or welfare fund which is

operated under the supervision of the banking or insurance laws of the state of New York or the United States, and (iv) eight and one-half percent of that portion of the fair market value of the property which exceeds the unpaid principal amount of the mortgate indebtedness referred to in subparagraph (iii) of this paragraph. Fair market value for the purposes of this paragraph shall be six times the annual gross rent. The collection of any increase in the stabilized rent for any aprtment pursuant to this paragraph shall not exceed six percent in any year from the effective date of the order granting the increase over the rent set forth in the schedule of gross rents, with collectivity of any dollar excess above said sum to be spread forward in similar increments and added to the stabilized rent as

established or set in future years.

§ 2. This act shall take effect immediately but the provisions of this act shall not affect any right of a pending applicant under this title to the warranted increase computed pursuant to the law as amended by this act effective one month after the date on which the owner originally completed his filing in accordance with the requirements of the conciliation and appeals board prior to the adoption of this act.

Opposition

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No. 81-227

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

RUTH HALPRIN, THEA SPEYER, PATRICIA FOXX, SARAH LANIER BARBER AND GLORIA DONADELLO, JED C. GOLDART, CAROL TAVRIS, PHILLIP FOXX, AND VICKI FOXX, ANNE KARLAN, PATRICIA L. FRIEDLANDER, CHARLES S. RAMAT, LESLIE GORDON FAGAN, TYLER L. BISHOP, AND GERTRUDE LANDAU,

PETITIONERS,

V.

NEW YORK CITY CONCILIATION AND APPEALS BOARD, AND 2 FIFTH AVENUE COMPANY (A PARTNERSHIP),

RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MEMORANDUM OF RESPONDENT, NEW YORK CITY CONCILIATION AND APPEALS BOARD OPPOSING PETITION FOR WRIT OF CERTIORARI

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TABLE OF CASES AND STATUTES CITED

Halprin v. New York City Conciliation and Appeals Board, 65 A.D.2d 961, 411 N.Y.S.2d 95 (1st Dept., 1978). Appeal dismissed, 46 N.Y.2d 850, 415 N.Y.S.2d 1028 (1978)

Lombard v. Board of Education, 502 F.2d 631 (2d Cir., 1974) cert. den. 420 U.S. 976 (1975)

Ornstein v. Regan, 574 F.2d 11 (2d Cir., 1978)

2 Fifth Avenue Company v. New York City Conciliation and Appeals Board, 57 A.D.2d 106, 393 N.Y.S.2d 409 (1st Dept., 1977)

Thistlewait v. City of New York, 497 F.2d 339 (2d Cir.) cert. denied 419 U.S. 1093 (1974)

STATUTES CITED

Civil Practice Law and Rules of New York State

The Rent Stabilization Law of New York City (Title YY, Chapter 51, New York City Administrative Code) and the Rent Stabilization Code

Title 42, U.S.C., Sections 1983 and 1985

IN THE
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OCTOBER TERM, 1981

RUTH HALPRIN, THEA SPEYER, PATRICIA FOXX, SARAH LANIER BARBER AND GLORIA DONADELLO, JED C. GOLDART, CAROL TAVRIS, PHILLIP FOXX AND VICKI FOXX, ANNE KARLAN, PATRICIA L. FRIEDLANDER, CHARLES S. RAMAT, LESLIE GORDON FAGAN, TYLER L. BISHOP, AND GERTRUDE LANDAU,

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MEMORANDUM OF RESPONDENT, NEW YORK CITY CONCILIATION AND APPEALS BOARD, OPPOSING PETITION FOR WRIT OF CERTIORARI

This memorandum is submitted by the respondent, New York City Conciliation and Appeals Board, in opposition to the petition for a Writ of Certiorari, brought by a group of tenants seeking in the Federal Courts the identical relief which they sought and were denied in the

Courts of New York State. The United States Court of Appeals, Second Circuit, in affirming the judgment of the District Court for the Southern District of New York, held that the tenants' "federal constitutional claims were fully presented and litigated in that proceeding /in the Courts of the State of New York/. Thus, those claims are barred by the doctrine of res judicata***". On this basis,the Court of Appeals upheld the District Court's grant of summary judgment in favor of the defendants, New York City Conciliation and Appeals Board, and 2 Fifth Avenue Company.

1. In a mandamus proceeding brought by the owner of the rent stabilized apartment building in question, the Appellate Division, First Department, of the New York State Supreme Court, ordered the New York City Conciliation and Appeals Board (hereinafter the Board) to process and determine the owner's application for rent increases under the comparative hardship provisions of the New York City Rent Stabilization Law (Title YY, Chapter 51, New York City Administrative Code) in accordance with the law in effect when the application was

filed, rather than pursuant to the subsequent amendment of the statutory provision. Matter of 2 Fifth Avenue Company v. New York City Conciliation and Appeals Board, 57 A.D.2d 106, 393 N.Y.S.2d 409 (1st Dept., 1977). Subsequent to the ruling of the Appellate Division, the tenants instituted a motion in that Court to intervene and vacate the Court's order. The alleged ground for the tenants' motion was that their rights to procedural due process of law under the Fifth and Fourteenth Amendments to the United States Constitution were violated by failure to give them notice of the mandamus proceeding and the opportunity to defend their rights in the proceeding. The Appellate Division denied the tenants' motion without opinion.

2. Pursuant to the Appellate Division's order, the Board conducted an oral hearing of the parties and afforded the tenants the opportunity to audit the owner's books and records. The tenants participated in the proceedings. Thereafter, the owner and a majority of the tenants entered into a settlement, which both reduced the quantum of the rent increases and postponed the collectability of the rent

increases from January 1, 1975 to January 1, 1978. The Board then issued a final determination granting the owner's application for rent increases on the basis of the stipulated settlement, while preserving the right of any tenant not a party to the settlement to seek judicial review.

3. The tenants (who are petitioners in this Court) instituted a proceeding for judicial review of the Board's order in New York State Supreme Court, New York County, pursuant to Article 78 of the New York State Civil Practice Law and Rules. The Supreme Court, New York County, on its own motion, transferred the proceeding to the Appellate Division, First Department, which had decided Matter of 2 Fifth Avenue Company v. New York City Conciliation and Appeals Board (supra).

4. The tenants, both in written briefs and upon oral argument, presented the same due process of law arguments to the Appellate Division as they had made in their earlier motion to that Court. The Appellate Division, on a full record, dismissed the tenants' petition and sustained the Board's order. Matter

of Halprin, et al v. New York City Conciliation and Appeals Board, 65 A.D.2d 961, 411 N.Y.S.2d 95 (1st Dept., 1978). The tenants filed a Notice of Appeal to the New York State Court of Appeals and that Court dismissed the appeal sua sponte, for lack of a substantial constitutional question. The tenants then moved to reargue the decision of the Court of Appeals on the ground that their appeal involved a substantial deprivation of their federal constitutional rights. The New York State Court of Appeals denied the tenants' motion for reargument.

5. The tenants then brought an action in the United States District Court for the Southern District of New York and asserted the same deprivation of federal constitutional rights as they made in the Courts of New York State (Title 42, U.S.C., Sections 1983 and 1985). The parties cross-moved for summary judgment, with the defendants asserting that the plaintiffs' action was barred by the doctrine of res judicata. The District Court, in an order and judgment signed by Judge Robert J. Ward, granted the defendants' motion for summary judgment and dismissed the complaint, holding that the action commenced by the plaintiffs

was "...precluded by the doctrine of res judicata" upon a finding that the plaintiffs "... had full and fair opportunity to present their claims in State Court, and those claims were actually litigated and determined in previous state court proceedings".

6. The tenants then appealed to the United States Circuit Court of Appeals for the Second Circuit. Upon a hearing of the positions of the respective parties in written briefs and upon oral argument, the Circuit Court of Appeals issued an opinion affirming the judgment of the District Court and holding that: "The petition, briefs and memoranda submitted by appellants to the state court in appellants' Article 78 proceeding, see Halprin v. New York City Conciliation and Appeals Board and 2 Fifth Avenue Co., disclose that appellants' federal constitutional claims were fully presented and litigated in that proceeding. Thus, those claims are barred by the doctrine of res judicata.***"

7. In seeking a writ of certiorari from this Court, the petitioners do not challenge the holdings of the Courts below that the

record shows that the petitioners' "...federal constitutional claims were fully presented and litigated in that proceeding" commenced in the Courts of the State of New York. The decision of the Courts below applied an established rule of the United States Court of Appeals for the Second Circuit, in finding that petitioners' "...claims are barred by the doctrine of res judicata". Lombard v. Board of Education, 502 F.2d 631 (2d Cir., 1974), cert denied 420 U.S. 976 (1975); Thistlewait v. City of New York 497 F.2d 339 (2d Cir.) cert denied 419 U.S. 1093 (1974); Ornstein v. Regan, 574 F.2d 115 (2d Cir., 1978).

8. Petitioners do not assert that the decision of the Court below conflicts with the ruling made in any other Court of Appeals' case involving the same issue. Nor do petitioners invoke any of the other grounds provided in Rule 17 of the Rules of this Court required for a writ of certiorari. The petition for a writ of certiorari in this case lacks substance and merit.

CONCLUSION

The petition for a writ of certiorari should be denied.

William E. Rosen,
of Counsel

Dated: New York, New York
September 1, 1981

Respectfully submitted,
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Opposition

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No. 81-227

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Supreme Court of the United States

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Petitioners,

v.

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM OPPOSING CERTIORARI

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(11310)

IN THE

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OCTOBER TERM, 1981

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MEMORANDUM OPPOSING CERTIORARI

1. The above-entitled cause was argued and submitted on June 3, 1981. On the next day the Court rendered its decision in an opinion, not to be reported or cited in unrelated cases, affirming the grant of summary judgment by the District Court on the ground of *res judicata*. (Appendix to Petition pp. 1a-3a.)

2. The petition for certiorari addresses an issue which was not decided by either of the courts below and not necessary for their

decision. Consequently, that issue is not subject to review by this Court. Petitioners, tenants in this respondent's building, contend that they were deprived of procedural due process because they were not made parties to a mandamus proceeding brought by respondent landlord against respondent Conciliation and Appeals Board. In that proceeding, the Court held that a statute which amended the hardship rent increase formula was not to be applied retroactively to this respondent's pending application because the Board had "deliberately delayed enforcement of a law not to its liking until it got one it did like" (Appendix to Petition p. 56a).

3. When the Board, applying the rule required by the mandamus judgment, granted a rent increase, petitioners sued to annul the order granting that increase on the ground that they had been denied due process because they had not been made parties to the mandamus proceeding. That constitutional claim was rejected by the Appellate Division of the Supreme Court (pp. 28a-30a) and petitioners' appeal from that Court's decision was dismissed by the Court of Appeals, the highest court of the State, *sua sponte* "upon the ground that no substantial constitutional question is directly involved" (p. 27a). Petitioners moved to vacate that denial, and their motion was denied (p. 15a).

4. Petitioners do not dispute the finding of the Court below, affirming the District Court, that the petition, briefs and memoranda filed by petitioners show that their "federal constitutional claims were fully presented and litigated" in the State Court proceeding (p. 3a). The decision that the claim is therefore barred by *res judicata* applies an established rule of the Second Circuit. See, *e.g.*, *Winters* v. *Lavine*, 574 F.2d 46 (2d Cir. 1978); *Turco* v. *Monroe County Bar Association*, 554 F.2d 515 (2d Cir.) *cert. denied*, 434 U.S. 834 (1977); *Thistlethwaite* v. *City of New York*, 497 F.2d 339 (2d Cir.) *cert. denied*, 419 U.S. 1093 (1974). Petitioners do not claim that the decision on this point is in conflict with that of another court of appeals case on the same matter; they do not assert the presence of any of the other considerations governing the grant of certiorari which are stated in Rule 17 of the Rules of this Court. The petition is entirely without merit.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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